STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 18, 2008
v	No. 278400 Macomb Circuit Court
DARRYL KEITH HUDSON, Defendant-Appellant.	LC Nos. 05-005424-FH 06-000207-FH

Before: Wilder, P.J., and Markey and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of two counts of first-degree retail fraud, MCL 750.356c, and one count of conspiracy to commit first-degree retail fraud, MCL 750.157a. Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12, to concurrent prison terms of three to ten years. We affirm.

Defendant first argues that he was denied the effective assistance of counsel because his defense counsel failed to argue that certain testimony by Detective Leonard Celletti, regarding out-of-court statements made to him about the identity of the person shown in the surveillance tapes, would have been admissible under MRE 801(d)(1)(C). Defendant further argues that defense counsel did not qualify the testimony for admission under MRE 801(d)(1)(C) by failing to cross-examine the declarant of the statements.

A defendant who claims to have been denied the effective assistance of counsel must establish that (1) the performance of defense counsel was below an objective standard of reasonableness under prevailing professional norms, and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v LaVearn*, 448 Mich 207, 213; 528 NW2d 721 (1995); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

Defendant failed to request either a *Ginther*[1] hearing or a new trial before the lower court. Therefore, "our review is limited to mistakes apparent from the record." *People v Cox*, 268

[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

Mich App 440, 453; 709 NW2d 152 (2005). Without the aid of evidence from a *Ginther* hearing, this Court cannot determine whether the evidence defendant sought to admit would have been beneficial to him or that his counsel's reasons for not pursuing admission of this evidence did not constitute trial strategy. Because "the record does not contain sufficient detail to support defendant's ineffective assistance claim . . . he has effectively waived the issue." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). In addition, given defendant's admission that he stole jewelry items from the Fraser store, coupled with the strong circumstantial evidence that defendant was involved in the theft from the Shelby Township store, it is highly unlikely that a different outcome would have resulted had the testimony at issue been admitted into evidence.

Defendant next argues that the evidence at trial was insufficient to prove beyond a reasonable doubt that he was guilty of conspiracy to commit first-degree retail fraud because the record did not contain sufficient evidence of an agreement to commit the crime. When reviewing a challenge to the sufficiency of the evidence, this Court views the evidence in the "light most favorable to the prosecution to determine whether the trial court could have found that the essential elements of the crime were proved beyond a reasonable doubt." *People v Sherman-Huffman*, 241 Mich App 264, 265; 615 NW2d 776 (2000).

A conspiracy is "a mutual agreement or understanding, express or implied, between two or more persons, to commit a criminal act or to accomplish a legal act by unlawful means." *People v Carter*, 415 Mich 558, 567; 330 NW2d 314 (1982), overruled in part on other grounds *People v Robideau*, 419 Mich 458; 355 NW2d 592 (1984). When viewed in the light most favorable to the prosecution, the evidence that Shepard Johnson motioned to defendant to go with him to the jewelry counter, that Johnson showed defendant that the jewelry counter was open, and that both Johnson and defendant then took necklaces from the counter was sufficient to prove beyond a reasonable doubt that defendant and Johnson had an implied agreement or mutual understanding that they would steal jewelry from the open counter. *Id.*; *People v Reddick*, 187 Mich App 547, 551; 468 NW2d 278 (1991).

Defendant next argues that the evidence was insufficient to prove beyond a reasonable doubt that he was guilty of one of the counts of first-degree retail fraud. Pursuant to MCL 750.356c(1), a person has committed that crime if he or she:

> (a) While a store is open to the public, alters, transfers, removes and replaces, conceals, or otherwise misrepresents the price at which property is offered for sale, with the intent not to pay for the property or to pay less than the price at which the property is offered for sale, if the resulting difference in price is $1,000.00 or more.
>
> (b) While a store is open to the public, steals property of the store that is offered for sale at a price of $1,000.00 or more.

Here, the record contained sufficient evidence to prove beyond a reasonable doubt that defendant committed first-degree retail fraud under MCL 750.356c(1)(b) by stealing jewelry from the Shelby Township Meijer store. The jury reasonably could have inferred that defendant stole the jewelry from the evidence that defendant was in the store at the approximate time of the jewelry theft, that a man matching his description was seen on the surveillance tape crouched

behind the jewelry counter, that the same man was seen on the surveillance tape crouched in the same aisle where the empty jewelry trays were later found, and that defendant admitted to a similar theft at the Fraser Meijer store. "Circumstantial evidence and the reasonable inferences arising therefrom can constitute satisfactory proof of the elements of a crime." *Reddick, supra* at 551.

Furthermore, the record contained sufficient evidence to prove beyond a reasonable doubt that defendant committed first-degree retail fraud under MCL 750.356c(1)(a) by removing a Power Wheel from its box and putting two LCD televisions into the Power Wheel box at the Shelby Township store. The evidence that a person matching defendant's clothing description asked a store employee where the Power Wheels were located, that a Power Wheel was found outside its box shortly thereafter, that defendant was subsequently observed in the store pushing a cart with a Power Wheel box on it, and that the Power Wheel box contained two LCD television sets was sufficient circumstantial evidence to prove beyond a reasonable doubt that defendant removed the Power Wheel from its box and replaced it with the television sets. In addition, the jury could reasonably infer from the evidence that defendant took a less expensive item out of a box and replaced it with a more expensive item with the intent to obtain the more costly item at the lesser price. Finally, when viewed in the light most favorable to the prosecution, *Sherman-Huffman, supra* at 265, there was sufficient evidence that the difference in price between the Power Wheel and the two television sets was $1,000 or more. Specifically, there was evidence that the television sets were priced "[w]ell over $600. Maybe 650" and other evidence that the Power Wheel was priced at $289 or $250.

Finally, because we find no error requiring reversal of defendant's convictions, we need not address defendant's argument regarding the scoring of Prior Record Variable 7.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Jane E. Markey
/s/ Michael J. Talbot